In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 621

WILLIAM H. DECK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. 1a–3a) has not been reported. The opinion of the court of appeals (Pet. 7a–10a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1964 (Pet. 7a), and a petition for rehearing was denied on September 25, 1964 (Pet. 2). The petition for a writ of certiorari was filed on October 26, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

756-062—64

QUESTION PRESENTED

Whether a taxpayer may assert the privilege against self-incrimination to bar production of his accountant's work papers which, under State law, belong to the accountant.

STATUTES INVOLVED

Internal Revenue Code of 1954:

> SEC. 7604. ENFORCEMENT OF SUMMONS.
>
> (a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.
>
> (b) *Enforcement.*—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such

order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

* * * * *

(26 U.S.C. 1958 ed., Sec. 7604.)

Business and Professions Code, 3A West's Annotated California Codes:

SEC. 5037. ACCOUNTANT'S OWNERSHIP OF PAPERS. All statements, records, schedules, working papers and memoranda made by a certified public accountant or public accountant incident to or in the course of professional service to clients by such certified public accountant or public accountant except reports submitted by a certified public accountant or public accountant to a client shall be and remain the property of such certified public accountant or public accountant, in the absence of an express agreement to the contrary between the certified public accountant or public accountant and the client.

STATEMENT

On November 21, 1963, an application to enforce an Internal Revenue summons was filed against petitioner Deck in the United States District Court for the District of Columbia (J.A. 1, 5–9, 14–16).[1] The application alleged that the Internal Revenue Service had begun an investigation of the income tax liabilities of petitioner Kless in June 1962; that a summons was thereafter served upon Lloyd B. Phillips, an accountant who had performed services for Kless, di-

[1] References designated "J.A." are to the joint appendix in the court below.

recting him to produce his work papers; that Phillips advised that he was willing to comply but had turned the work papers over to Kless upon the latter's request that Deck, Kless' attorney, be permitted to examine them; that Deck acknowledged receipt of the work papers and promised to return them to Phillips, but had refused to comply with Phillips' demands that they be returned; and that Deck had refused to comply with the summons served upon him for these papers on the ground that the papers belonged to Kless and production would violate Kless' privilege against self-incrimination (J.A. 5–7).

A full hearing, at which petitioner Kless was allowed to intervene (J.A. 11–13), was held (J.A. 35–156). Petitioners conceded during this hearing that the only material issue was whether the work papers were owned by Phillips or by Kless (J.A. 45–49, 74, 82, 101–103, 115, 139–140). The district court found that they were owned by Phillips and concluded that petitioners could not invoke the privilege against self-incrimination or the attorney-client privilege to bar examination of Phillips' papers by government agents. The court thereupon ordered Deck to comply with the summons (J.A. 17–21).[2] The court of appeals affirmed.

ARGUMENT

This case presents no issue warranting consideration by this Court. The underlying factual determination—which resolved the sole disputed question

[2] The work papers were deposited with the clerk of the district court pending the outcome of the appeal and the proceedings in this Court (J.A. 20–21).

in the district court—is supported by abundant evidence, and there is no conflict of decisions regarding the scope of the privilege against self-incrimination under the circumstances presented here.

1. Petitioners do not appear to challenge in this Court the sufficiency of the evidence to sustain the district court's finding that Phillips was acting as a public accountant, and not as a bookkeeper, while performing services for petitioner Kless (Pet. 3, n. 1). This finding was based on the testimony that between 1946 and 1952 Phillips, a self-employed public accountant, had performed all of Kless' accounting services and prepared his tax returns (J.A. 50–54). In 1952, Kless employed an accountancy firm to prepare his tax returns, but Phillips was retained to make a thorough year-end examination of Kless' books (J.A. 55–56). Phillips drew up work papers based on the books and submitted them to the accounting firm which photographed them and then prepared the returns (J.A. 55–57, 75–78, 129, 144). The work papers were returned to Phillips who kept them in his files (J.A. 57, 95), so that, as he expressed it (J.A. 58):

> * * * if it became necessary at any future date, if the records of the client had been altered in any way, I would have evidence to show what I had pulled off and to prove that they had been altered.

In November 1962, Kless asked Phillips for the work papers so that they could be examined by Deck. The papers were turned over to Kless, who subsequently advised Phillips that Deck had taken them

with him to Washington for further examination (J.A. 60–61).

Under these circumstances, the applicable California statute (which controlled this case because both Phillips and Kless resided and transacted their business in San Francisco) vested ownership of these papers in Phillips. Business and Professions Code, 3A West's Annotated California Codes, Sec. 5037 (p. 3, *supra*).[2]

2. Since Phillips owned these papers, Deck—who had no interest greater than temporary possession—could assert neither the attorney-client privilege nor Kless' privilege against self-incrimination to prevent their disclosure. When, as here, the holder of documents neither owns nor has a legally cognizable personal interest in them, he may not refuse a lawful demand for production on the ground of self-incrimination. For example, a bankrupt's claim of the privilege in resisting an order to turn over his books to a receiver was rejected by this Court on the ground that he no longer had rights of ownership or possession: "The right not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story." *Matter of Harris,* 221 U.S. 274, 279–280. And in *Curcio* v. *United States,* 354 U.S. 118, 128, this Court said, "The compulsory

[2] In addition to the evidence already detailed it should be noted that Kless's books did not list Phillips as an employee (J.A. 57, 65, 82, 86–91, 135–136). Moreover, although Phillips had prepared such work papers since 1946 and had kept them in his own office, Kless testified that it never occurred to him to ask for them until after the Internal Revenue Service began its investigation (J.A. 137–138).

production of corporate or association records by their custodian is readily justifiable, even though the custodian protests against it for personal reasons, *because he does not own the records and has no legally cognizable interest in them.*" (Emphasis supplied.) See also *Ex parte Fuller*, 262 U.S. 91, 93–94; *Dier* v. *Banton*, 262 U.S. 147, 149–151; *Johnson* v. *United States*, 228 U.S. 457; *In re Fahey*, 300 F. 2d 383, 385 (C.A. 6); *Sale* v. *United States*, 228 F. 2d 682, 686 (C.A. 8), certiorari denied, 350 U.S. 1006; *Bouschor* v. *United States*, 316 F. 2d 451, 456 (C.A. 8); *United States* v. *Boccuto*, 175 F. Supp. 886, 890 (D. N.J.), appeal dismissed, 274 F. 2d 860 (C.A. 3).

None of the cases cited by petitioners conflicts with the decision of the court below. Petitioners place their chief reliance (Pet. 6, 12–13) upon *United States* v. *Judson*, 322 F. 2d 460 (C.A. 9), but in that case the accountant's papers had been prepared at the request of the attorney advising the taxpayers. The accountant no longer claimed that they were his property, and the trial court held that they had become part of the attorney's work papers. 322 F. 2d at 462–463. The same is true of *Application of House*, 144 F. Supp. 95, 101–102 (N.D. Cal.) in which title to the accountant's work papers had been transferred to the taxpayer. The Fourth Amendment cases (Pet. 10–12, 16–18) are obviously not in point. In each of those instances the party asserting the constitutional right had personally been subjected to some violation of privacy, even though the premises upon which the intrusion was made were only temporarily under that party's control. No similar argument is available to

a person asserting the privilege against self-incrimination to bar disclosure of documents belonging to another.[4]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

NOVEMBER 1964.

---

[4] There is no evidentiary basis whatever for petitioners' present contention that Kless retained some undefined possessory interest in the papers (Pet. 7–10). This argument appears to rest on allegations that the work papers were "the only extant records of the Company" after the original books had been destroyed in a fire, and that they were "voluntarily" turned over to Kless by Phillips (Pet. 5; see also Pet. 2, 8). But the papers were not the only extant records. The evidence shows that the accounting firm had made photostats of Phillips' papers each year (J.A. 75, 144), Kless himself admitted that these records were kept (J.A. 129), and petitioners obviously had ample time even to make copies of Phillips' papers while they were in their possession. Nor does the evidence establish the "voluntariness" of the transfer from Phillips to Kless. On the contrary, the evidence demonstrated that the papers were obtained from Phillips on a representation that they were being borrowed for a short time (J.A. 59–61, 63–66).

U.S. GOVERNMENT PRINTING OFFICE: 1964